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In The
Supreme Court of the United States
October Term, 1984

EDWARD MALLEY AND
THE STATE OF RHODE ISLAND,
Petitioners,

vs.

JAMES R. BRIGGS AND LOUISA BRIGGS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a police officer who believes the facts in his arrest warrant affidavit to be true, who submits such an affidavit to a neutral and detached judge for a probable cause determination, and who obtains the arrest warrant from the judge can be held liable for "constitutional negligence" under 42 U.S.C. § 1983 for damages resulting from the arrest because it is subsequently determined that the police officer should have known that the facts recited in his affidavit did not constitute probable cause.

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EDWARD MALLEY AND
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Now come Petitioners, Edward Malley and the State of Rhode Island, by their attorneys, and respectfully pray that this Honorable Court issue a writ of certiorari to review the judgment and opinion of the United States Court

of Appeals for the First Circuit entered in this proceeding on November 19, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit, reported at 748 F.2d 715, is reproduced in Appendix A.

The unpublished Order of the United States District Court for the District of Rhode Island, dated February 2, 1984, is reproduced in Appendix B. The unpublished Opinion and Order of the United States District Court for the District of Rhode Island, dated May 14, 1984, is reproduced in Appendix C.

JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals for the First Circuit was entered on November 19, 1984. On February 13, 1985, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including April 5, 1985. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code, Title 42:

§ 1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

In December of 1980, the Rhode Island State Police were conducting a court-authorized wiretap in connection with a narcotics investigation. This wiretap investigation was being supervised by petitioner Edward Malley, who at the time held the rank of Trooper with the Rhode Island State Police and was assigned to narcotics duty in the detective division.

As part of this wiretap investigation, Trooper Malley reviewed the logged information regarding a telephone call that subsequently served as the basis for submitting affidavits and applications for arrest warrants for respondents James and Louisa Briggs. After reviewing the logged information regarding the telephone call and discussing the drug terminology used in the conversation with his partner, Trooper Malley concluded in good faith that an incriminating telephone call had been made regarding Mr. and Mrs. Briggs. Accordingly, Trooper Malley put the information that was in his possession into affidavits and applications for arrest warrants for James and Louisa Briggs, which he presented to Judge Capelli of the Rhode Island District Court. The Judge issued the arrest warrants for James and Louisa Briggs, who were subsequently arrested. The charges against Mr. and Mrs. Briggs were later dropped, because the grand jury to which the charges were presented returned no true bill.

On September 18, 1981, James and Louisa Briggs filed a complaint under 42 U.S.C. § 1983 against Edward Malley and the State of Rhode Island in the United States District Court for the District of Rhode Island alleging Fourth and Fourteenth Amendment violations.[1] The jurisdiction

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[1] Mr. and Mrs. Briggs also alleged pendent state claims of malicious prosecution, defamation, and false imprisonment.

of the District Court was invoked under 28 U.S.C. § 1343(3). In their complaint, Mr. and Mrs. Briggs alleged that they had been unlawfully arrested and imprisoned because the arrest warrants by which they were arrested were constitutionally deficient in that the affidavits submitted in support of the warrant applications did not set forth sufficient facts to establish probable cause to believe that Mr. and Mrs. Briggs had committed the offense alleged.

The case was tried before a jury in February of 1984. At the close of plaintiffs' evidence, defendants Malley and the State of Rhode Island moved for a directed verdict; the trial judge granted the motion as to both defendants. Mr. and Mrs. Briggs filed a Motion for New Trial or, in the Alternative, for Relief from Judgment, which was denied by the trial judge. In ruling in favor of Trooper Malley on both of these motions,[2] the trial judge determined that a policeman who believes the facts in his arrest warrant affidavit to be true and who submits such an affidavit to a neutral and detached judge for a probable cause determination cannot be held liable under 42 U.S.C. § 1983 for two reasons: (1) such a policeman is immune from liability; and (2) the judge's intermediate decision to issue an arrest warrant breaks the causal chain and insulates such a policeman from liability. App. B and C.

Mr. and Mrs. Briggs appealed from the judgment in favor of Trooper Malley. The Court of Appeals for the First Circuit reversed the trial judge, deciding that "judi-

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[2]Because Mr. and Mrs. Briggs did not appeal the Judge's ruling in favor of the State of Rhode Island, that ruling is not at issue here and accordingly is not discussed.

cial approval of a warrant cannot act as an absolute bar to the § 1983 liability of the officer who obtained the warrant." *Briggs v. Malley*, 748 F.2d 715, 721 (1st Cir. 1984) (App. 16). The court emphasized that § 1983 liability will attach where an officer is " 'constitutionally negligent,' that is, where the officer should have known that the facts recited in the affidavit did not constitute probable cause . . . ." *Id.* On the other hand, in those cases in which "the sufficiency of the facts fall into the grey area appropriate for judicial determination, submission of the affidavit to a magistrate will insulate the officer from liability." *Id.* Because the Court of Appeals determined that the district court had improperly directed a verdict for Trooper Malley, the court reversed and remanded for a new trial.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted in this matter to resolve the question of whether a police officer is liable under 42 U.S.C. § 1983 for damages resulting from an arrest that was conducted pursuant to a warrant that he sought and that was issued by a neutral and detached judge. This writ should be granted because the Court of Appeals' decision, which held that a police officer could be so liable, is in conflict with principles enunciated by this Court regarding the division of functions between neutral and detached judges or magistrates[3] and police

[3]Because the judicial reviewing authority in the warrant process is sometimes labeled a judge and sometimes labeled a magistrate, both of these terms may be found in the applicable case law and often are used interchangeably. Accordingly, both of these terms will be used in this petition to mean the judicial officer who receives the information from the police officer and who makes the determination of whether probable cause exists and whether a warrant should issue.

officers in seeking and issuing warrants. *See Massachusetts v. Sheppard*, —U.S.—, 104 S. Ct. 3424 (1984); *Baker v. McCollan*, 443 U.S. 137 (1979); *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Johnson v. United States*, 333 U.S. 10 (1948). In addition, the Court of Appeals' decision incorrectly applies the principles of qualified immunity set forth in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Finally, the Court of Appeals' decision is in conflict with the chain of causation principles outlined by other Circuit Courts of Appeals. *See McSurely v. McClellan*, 697 F.2d 309 (D.C. Cir. 1982); *Garris v. Rowland*, 678 F.2d 1264 (5th Cir.), *cert. denied sub nom. Ft. Worth v. Garris*, 459 U.S. 864 (1982); *Smith v. Gonzales*, 670 F.2d 522 (5th Cir.), *cert. denied*, 459 U.S. 1005 (1982); *Smiddy v. Varney*, 665 F.2d 261 (9th Cir. 1981), *cert. denied*, 459 U.S. 829 (1982); *Ames v. United States*, 600 F.2d 183 (8th Cir. 1979); *Rodriguez v. Ritchey*, 556 F.2d 1977 (5th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978); *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978).

The Court Of Appeals' Decision Is In Conflict With This Court's Principles Regarding The Functions Of Police Officers And Magistrates.

According to the Court of Appeals' decision, even if a neutral and detached magistrate or judge determines that probable cause exists and issues an arrest warrant, the police officer can still face liability if the magistrate is later overruled and if the overruling authority decides that the officer should have known that the facts recited in his supporting affidavit did not constitute probable cause. That decision is in conflict with this Court's recognition that there is a "reasonable division of functions" between police officers, magistrates, and judicial officers. *Baker v. McCollan*, 443 U.S. at 145. This Court has

determined that one facet of this division of functions is best instituted by having police officers engage in ferreting out crime and by having neutral and detached magistrates determine the existence of probable cause and issue warrants. *Gerstein v. Pugh,* 420 U.S. at 112-13. Thus, while there is no rule absolutely prohibiting a police officer from arresting an individual for a felony without a warrant if the police officer determines that probable cause to arrest exists, *United States v. Watson,* 423 U.S. 411, 416-17 (1976), there is a preference for the use of arrest warrants when feasible. *Beck v. Ohio,* 379 U.S. 89, 96 (1964). The "classic statement" of the principle requiring "that the existence of probable cause be decided by a neutral and detached magistrate whenever possible," *Gerstein v. Pugh,* 420 U.S. at 112, is found in *Johnson v. United States,* 333 U.S. 10 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Id. at 13-14 (footnote omitted). Thus, the preference is that it be the role of the magistrate, not of the police officer, to draw inferences from the evidence and to determine if probable cause exists.[4] The police officer's role, on the

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[4]As this Court has noted:

> [T]he informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make ar-

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other hand, is to "ferrest out crime" and to bring the evidence of such crime to the magistrate for the magistrate's neutral and independent review.

If the Court of Appeals' decision is left undisturbed, it will change the nature of this Court's determination of the proper roles of the police officer and the magistrate in the warrant process. In essence, the lower court's decision requires the police officer not only to do his duty regarding investigating and "ferreting out crime" but also to determine in the first instance whether probable cause exists in order to justify bringing certain factual information regarding potential criminal activity to the attention of a neutral and detached magistrate.

The Court of Appeals has added a new layer to the constitutional dimension of probable cause; now, in addition to the constitutional requirement that warrants shall issue only on probable cause, comes the requirement that a police officer shall submit information in support of an application for a warrant to a neutral and detached magistrate only if the police officer can fairly surely say that probable cause exists before he submits the information to the magistrate. The function of the neutral and detached magistrate, while still existing in theory, actually has been passed on to the police officer, who must make an accurate

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> rests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.

Johnson v. United States, 333 U.S. at 14 n.3, *quoting United States v. Lefkowitz*, 285 U.S. 452, 464 (1932).

initial determination of the existence of probable cause or face personal civil liability under 42 U.S.C. § 1983.

Although the Court of Appeals carved out a "grey area" in which a police officer supposedly will not face liability for presenting information to a magistrate for the magistrate's review, such an area free from potential liability is an illusion. In reality, under this decision the police officer will always face potential liability for presenting the information available to him to the magistrate for an independent and detached review regarding the presence of probable cause, because even if the magistrate determines that probable cause exists and issues the warrant, the police officer can still face liability if the magistrate is later overruled and if it is determined that the officer should have known that the facts recited in his supporting affidavit did not constitute probable cause. Thus, even if the police officer believes that the facts in his possession fit within the "grey area," he cannot be assured that any future reviewing authority will agree that he was correct in that belief.

Accordingly, the police officer is given the responsibility by the Court of Appeals to make a complete and accurate determination of the existence of probable cause before he submits the information in his possession to a magistrate for the magistrate's review . Because this new division of responsibility between a police officer and a magistrate so changes this Court's enunciated principles regarding the proper roles of police officers and magistrates in the warrant process, this Court should grant this Writ of Certiorari to review the decision.

The Court Of Appeals' Decision Incorrectly Applies The Principles Of Harlow v. Fitzgerald Qualified Immunity.

This Court's most recent decision regarding the standard by which to judge the qualified immunity available to government officials is *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), in which the Court held "that government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. This standard is one of "objective reasonableness . . . measured by reference to clearly established law." *Id.* (footnote omitted).

The Court of Appeals decided that the *Harlow* standard "should be understood to prohibit conduct which is 'constitutionally negligent.'" *Briggs v. Malley*, 748 F.2d at 718 (App. 16). In the situation where a police officer submits affidavits in support of an application for an arrest warrant to a judge, the court defined "constitutionally negligent" to be that situation in which the officer seeks judicial determination of sufficiency of an affidavit if the officer should have known that the facts recited in the affidavit did not constitute probable cause. *Id.* at 721. The court further determined that a "grey area" exists, in which it is appropriate for a police officer to seek judicial determination of sufficiency of an affidavit; in this area, a police officer will be immune from liability if he submits the affidavit to the magistrate for the magistrate's review. *Id.*

This decision by the Court of Appeals, while ostensibly applying the *Harlow* standard to its factual situation, actually conflicts with the basic principles enunciated in

Harlow and in other decisions by this Court regarding the relationship between police officers and reviewing magistrates or judges.

The standard set forth in *Harlow*, as applied to this case, is that a police officer will be immune from liability if *his conduct* does not violate clearly established constitutional rights of which a reasonable police officer would have known. The only conduct by Trooper Malley complained of in this action is that Trooper Malley presented the information in his possession to a judge for review. Such conduct, however, cannot be considered as a violation of Mr. and Mrs. Briggs' constitutional rights; if the judge had rejected Trooper Malley's application for an arrest warrant, there would not even have been any knowledge by Mr. and Mrs. Briggs of Trooper Malley's actions, let alone any violation of their constitutional rights.

Undoubtedly it is true "that under our system of government the police have a duty to fight crime without violating constitutional rights." *Briggs v. Malley*, 748 F.2d at 719 (App. 13). It cannot be expected, however, that a police officer should believe that taking the information in his possession to a neutral and detached magistrate for the magistrate's review would violate a person's constitutional rights.[5] In fact, just the opposite is true, because taking such information to a neutral and detached magistrate is what this Court has directed the police officer to do in order to assure the "maximum protection" for a person's rights:

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[5]It is recognized that the police officer could face liability if he misled the magistrate by information in the affidavit that the police officer knew was false or would have known was false except for his reckless disregard of the truth. *See United States v. Leon*, — U.S. —, 104 S. Ct. 3405, 3421 (1984).

> Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest . . . .

Gerstein v. Pugh, 420 U.S. at 113. It is the reviewing magistrate, not the police officer, who is given the role of being the individual's "single-minded protector." *Madison v. Manter*, 441 F.2d 537, 539 (1st Cir. 1971). *See also Johnson v. United States*, 333 U.S. at 13-14. Thus, it cannot be an error of constitutional dimension for a police officer to present the information that he possesses to the magistrate, the "single-minded protector" of an individual's constitutional rights, for the magistrate's review and determination of whether probable cause exists. *See Massachusetts v. Sheppard*, —U.S.—, 104 S. Ct. 3424 (1984).

The Court of Appeals rejected this standard of designating the magistrate or reviewing judge as the individual's "sole protector," stating that such a standard would encourage "sloppy police work" and enlarge "the margin of error leading to unconstitutional invasions of our persons and homes." *Briggs v. Malley*, 748 F.2d at 720 (App. 13-14). Such a conclusion, however, does not follow from the fact that a neutral and detached magistrate is assigned the role of "protector" of the individual's rights. The protector status of the magistrate is that of "*single-minded*" protector, not "*sole*" protector. The police officer, too, has the role of protector in the arrest process, which role is fulfilled by bringing the information in his possession to a neutral and detached magistrate for the magistrate's review. Once a police officer fulfills his duty as "protector" in this way, the role of "protector" shifts to the magistrate. Police officers have nothing to gain by being sloppy in assembling their information if they know that it will be independently reviewed and assessed by the

magistrate, who will reject it if the proper standards are not met. Further, having a judge, with legal experience and training, review the information and make an independent assessment of the existence of probable cause should decrease any margin of error that might otherwise exist, for the judge has the advantage of being more detached from the "competitive enterprise of ferreting out crime" than the police officer. *Johnson v. United States*, 333 U.S. at 14.

The Court of Appeals' reasoning appears to be based on the belief that "[u]nfortunately, not all magistrates subject the affidavit to the scrutiny required by the fourth amendment." *Briggs v. Malley*, 748 F.2d at 720. The standard for a police officer's liability, however, should not be determined by the fear that certain judges and magistrates may not adequately fulfill the role assigned to them. Rather, a police officer's liability should be based on his *own* conduct. If the magistrate issues a warrant based upon the accurate information presented to him by the police officer, but the warrant lacks probable cause, "[a]n error of constitutional dimensions may have been committed . . . , but it was the judge, not the police officer[], who made the critical mistake." *Massachusetts v. Sheppard*, 104 S. Ct. at 3429.[6]

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[6]The Court of Appeals appears to have recognized this principle, but it was concerned that:

> [t]he absolute judicial immunity of the magistrate precludes suit against him or her. Were we to permit the interposition of the magistrate between the police officer and the warrant to immunize the negligence of the police officer, such plaintiffs would be rendiless.

Briggs v. Malley, 748 F.2d at 720. The fact that the magistrate is immune from liability, however, does not mean that his negligence or misconduct should be transferred to the police officer.

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A police officer should not be punished for relying on the neutral and detached judgment of a magistrate in determining the existence of probable cause for arrest. Surely a police officer should not be asked to question the policy set down by this Court of paying great deference to a magistrate's determination of probable cause. *See Illinois v. Gates*, —U.S.—, 103 S. Ct. 2317, 2331 (1983). "In certain situations there is an overriding societal interest in having individuals rely on the authoritative pronouncements of officials whose decisions we wish to see respected." *United States v. Barker*, 546 F.2d 940, 947 (D.C. Cir. 1976).[7]

Accordingly, a police officer should be found to have acted "objectively reasonable," and therefore to be immune from liability, in those circumstances in which he submits the information that he possesses to a neutral and detached magistrate or judge for a probable cause determination. Such an officer is acting pursuant to the direction of this Court and, as such, is acting in a *per se* objectively reasonable fashion.

Because the Court of Appeals' decision incorrectly applies this Court's principles of qualified immunity, the Court should grant this Writ of Certiorari to review the decision.

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In addition, the Court of Appeals has failed to consider that its standard requires a police officer to be able to identify the presence or absence of probable cause when such identification is unable to be made by a judge who is trained in much greater detail to make such identification.

[7]If the work of a police officer is to proceed effectively, he must be made to " 'understand that action taken in the good-faith fulfillment of [his] responsibilities and within the bounds of reason under all the circumstances will not be punished and that [he] need not exercise [his] discretion with undue timidity.' " *Procunier v. Navarette*, 434 U.S. 555, 562 (1978), *quoting Wood v. Strickland*, 420 U.S. 308, 321 (1975).

The Court Of Appeals' Decision Creates A Conflict Among The Circuits Regarding The Chain Of Causation.

The rule generally followed in other Circuit Courts of Appeals is that "if the facts supporting an arrest are put before an intermediate such as a magistrate or grand jury, the intermediate's decision breaks the casual chain and insulates an initiating party." *Rodriguez v. Ritchey,* 556 F.2d at 1193. *See McSurely v. McClellan,* 697 F.2d at 324; *Garris v. Rowland,* 678 F.2d at 1273 n.6; *Smiddy v. Varney,* 665 F.2d at 266 (filing of criminal complaint immunizes investigating officers from damages suffered thereafter); *Ames v. United States,* 600 F.2d at 185 (grand jury indictment breaks chain of causation). The standard is that the rule will apply absent any allegation of presentation of false evidence or the withholding of evidence, *id.*, on the theory that the intervening actor made independent decisions that broke the chain of causation. *Smith v. Gonzales,* 670 F.2d at 526; *Dellums v. Powell,* 566 F.2d at 193.

This theory is obviously relevant in the instant case, because Trooper Malley submitted the information in his possession to the judge for the judge's independent review and evaluation. No allegations have been made that Trooper Malley withheld evidence or presented false evidence, and no allegations have been made that the judge failed to make an independent decision regarding the existence of probable cause and the issuance of the arrest warrants. Therefore, according to the principles of the causation theory, the judge's exercise of his independent responsibility broke the chain of causation and insulated Trooper Malley from liability.

The Court of Appeals' decision summarily rejected the theory of causation adopted by other Circuit Courts of Appeals. *Briggs v. Malley*, 748 F.2d at 721 (App. 15-16). Accordingly, the Writ of Certiorari should be granted, because only this Court can resolve this conflict among the circuits.

CONCLUSION

Because the Court of Appeals' decision in this matter (1) is in conflict with principles enunciated by this Court regarding the division of functions between neutral and detached judges or magistrates and police officers in seeking and issuing warrants, (2) incorrectly applies the principles regarding qualified immunity established by this Court, and (3) is in conflict with the chain of causation principles outlined by other Circuit Courts of Appeals, this Court should issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

James R. BRIGGS, and Louisa Briggs,

Plaintiffs, Appellants,

v.

Edward MALLEY, et al.,

Defendants, Appellees.

No. 84-1449.

United States Court of Appeals,
First Circuit.

Argued Sept. 13, 1984.

Decided Nov. 19, 1984.

Plaintiffs brought civil rights action arising out of their arrest. The United States District Court for the District of Rhode Island, Raymond J. Pettine, Senior District Judge, directed verdict for police officers, and plaintiffs appealed. The Court of Appeals, Bownes, Circuit Judge, held that judicial approval of arrest warrant did not serve as absolute bar to civil rights liability of police officer who obtained warrant.

Reversed and remanded for new trial.

Aldrich, Senior Circuit Judge, filed a concurring opinion.

1. Civil Rights 13.8(4)

Issuance of arrest warrant by judicial officer does not provide an impregnable shield against liability under civil rights statute for negligent conduct. 42 U.S.C.A. § 1983.

2. Civil Rights 13.8(1)

Presence of subjective good faith or absence of malice on part of public employee is irrelevant to determination of immunity; rather, conduct of state and government officials is to be measured by objective reasonableness standard and conduct which violates clearly established statutory or constitutional rights of which reasonable person would have known will support civil rights liability. 42 U.S.C.A. § 1983.

3. Civil Rights 13.8(1)

Official conduct which negligently leads to violation of constitutional rights is sufficient to overcome any qualified immunity official may have against civil rights liability. 42 U.S.C.A. § 1983.

4. False Imprisonment 7(3)

It is not negligence for a police officer to seek an arrest or search warrant in a merely questionable situation; in such a case, determination by magistrate that a warrant should issue will insulate officer from a negligence claim.

5. Civil Rights 13.8(4)

Judicial approval of an arrest warrant cannot serve as an absolute bar to civil rights liability of officer who obtained warrant; however, liability does not attach simply because there is a later determination of no probable cause but attaches only where officer is constitutionally negligent, where officer should have known that facts recited in affidavit did not constitute probable cause; disavowing

Madison v. Manter, 441 F.2d 537 and *Stadium Films, Inc. v. Baillargeon*, 542 F.2d 577.

6. Civil Rights 13.8(4)

Judicial approval of an arrest warrant did not serve as an absolute bar to civil rights liability of officer who obtained warrant. 42 U.S.C.A. § 1983.

John S. Foley, Providence, R.I., with whom Decof & Grimm, Providence, R.I., was on brief for plaintiffs, appellants.

Faith A. LaSalle, Sp. Asst. Atty. Gen., Providence, R.I., with whom Dennis J. Roberts, II, Atty. Gen., Providence, R.I., was on brief for defendants, appellees.

Before BOWNES, Circuit Judge, ALDRICH and SKELTON,* Senior Circuit Judges.

BOWNES, Circuit Judge.

Plaintiffs James and Louisa Briggs were arrested in March of 1981 under an arrest warrant which was obviously lacking in probable cause. The issue before us is whether the police officer who submitted the inadequate affidavit upon which the arrest warrant was based can be held liable for negligence under 42 U.S.C. § 1983 for damages resulting from the arrest. The district court directed a verdict for the officer, holding that the issuance of the arrest warrant by a judge insulated the officer from liability.

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* Of the Federal Circuit, sitting by designation.

The arrest of Mr. and Mrs. Briggs was triggered by the interception of a telephone call on a court-authorized wiretap in connection with a narcotics investigation of one Paul Driscoll, who was a friend of the Briggs' daughter, Jamie. The police officer on duty noted the substance of this call on a call log. The call log stated that the caller identified himself as "Dr. Shogun" and that there was a general conversation about a party the preceding night. The call log indicated that "caller says I can't believe I was token [*sic*] in front of Jimmy Briggs—caller states he passed it to Louisa—caller and Paul talk about another party going down tonight—Paul says Nancy was sitting in his lap rolling her thing . . . ." The investigation was being directed by defendant Edward Malley, who at that time held the rank of corporal with the Rhode Island State Police and was assigned to narcotics duty in the detective division. Malley was not present when the call from "Dr. Shogun" was intercepted, but discussed the drug terminology with his partner, Detective Youngsma. They determined that the call was incriminating because "token" is drug parlance for smoking marijuana and "rolling her thing" means rolling a marijuana cigarette. After the wiretap was shut down, Malley prepared affidavits for the issuance of arrest warrants for twenty-two people based upon the information obtained from the tap on Driscoll's phone.

Based solely on the conversation related above, Malley prepared an affidavit and arrest warrant form and a district court felony complaint form for both James and Louisa Briggs. The crime charged in the felony complaint

was conspiracy to possess marijuana, a misdemeanor.[1] After preparing the affidavit, arrest warrant and complaint forms, Malley then appeared before a judge of the Rhode Island District Court, who issued arrest warrants for James and Louisa Briggs as well as twenty other individuals. Plaintiffs were arrested about twenty-three days later in the early hours of the morning. They were taken to the state police barracks and later that day to court for arraignment. The fact of their arrest was published in the local and statewide newspapers. The charges against plaintiffs were subsequently dropped because the grand jury to which the charges were presented returned no true bill.

Plaintiffs commenced an action under 42 U.S.C. § 1983 against both Corporal Malley and the State of Rhode Island alleging fourth and fourteenth amendment violations and additionally filed state law claims of malicious prosecution, defamation and false imprisonment against the same defendants. The case was tried before a jury in February of 1984 and, at the close of plaintiff's evidence, both defendants moved for a directed verdict. The trial judge delivered an opinion from the bench in late February granting the motion as to both defendants. Plaintiffs filed a motion for a new trial, bringing to the trial judge's attention this court's February 6, 1984 decision in *B.C.R. Transport Co., Inc. v. Fontaine*, 727 F.2d 7 (1st Cir. 1984). The district court, in a second opinion, denied plaintiff's motion for a new trial. Plaintiffs have appealed

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1. At the trial below, Malley said that this was a mistake and that the charge was actually conspiracy to possess marijuana with intent to deliver, which is a felony, because "[i]n a wiretap all charges are conspiracy."

from the judgment in favor of Malley, but not the judgment in favor of Rhode Island.

In its initial opinion directing a verdict for Corporal Malley, the district court relied upon two lines of precedent. Under the First Circuit cases of *Madison v. Manter*, 441 F.2d 537 (1st Cir. 1971), and *Stadium Films, Inc. v. Baillargeon*, 542 F.2d 577 (1st Cir. 1976), the district court found police officers to be immune from liability for negligently seeking warrants without probable cause. In both these cases, we had applied the state law of privilege or immunity which required malice before a police officer could be held liable for improper prosecution. *Madison*, 441 F.2d at 538; *Stadium Films*, 542 F.2d at 578. Acknowledging, however, that this approach may have been undercut by recent developments in good faith immunity set out in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the district court turned to Fifth Circuit precedent because it provided a more solid basis for the same result. In *Rodriquez v. Ritchey*, 556 F.2d 1185 (5th Cir. 1977), *cert. denied*, 434 U.S. 1047, 98 S.Ct. 894, 54 L.Ed.2d 799 (1978), and *Smith v. Gonzales*, 670 F.2d 522 (5th Cir. 1982), *cert. denied*, 459 U.S. 1005, 103 S.Ct. 361, 74 L.Ed.2d 397 (1982), the Fifth Circuit held that when "the facts supporting an arrest are put before an intermediary, such as a Magistrate or Grand Jury, the intermediary's decision to issue a warrant or return an indictment, breaks the causal chain and insulates the initiating party." *Smith*, 670 F.2d at 526. Thus, regardless of any developments in immunity law allowing negligent conduct to ground § 1983 liability, the district court found that the approval of the arrest warrant by the judge removed any causal connection between the acts of the police officer

and the damage suffered by the plaintiffs due to their improper arrest.

In its second opinion, reconsidering its decision in light of *B.R.C. Transport Co., Inc. v. Fontaine,* 727 F.2d 7, the district court indicated that it did not find *B.R.C.* to be a decisive break with past First Circuit precedent. In *B.R.C. Transport Co., Inc. v. Fontaine,* we upheld a jury verdict awarding damages against a police officer for a search and seizure which violated the fourth amendment. We held that where a police officer obtained a search and arrest warrant based upon information furnished by a complainant-victim, the presence of probable cause was still an issue for the trier of fact, as was the issue of the officer's reasonableness under the *Harlow* immunity standard. In a footnote, we rejected the officer's argument that the magistrate's approval of the warrant prevented a jury from reaching behind this approval and determining probable cause: "[T]his judicial imprimatur is [not] an impregnable shield against any attack on the sufficiency of the underlying affidavit." 727 F.2d at 10 n. 1. We then went on to apply the *Harlow* immunity test to determine whether the officer's conduct in swearing out the affidavit had been objectively reasonable. Implicit in our use of this test was the determination that just as a judicial imprimatur does not serve as an impregnable shield against determining the sufficiency of the underlying affidavit, it would also not serve to shield a police officer from liability due to the improper submission of an insufficient affidavit.

The district court pointed out that *B.R.C.* failed to address the possibility that judicial approval of the warrant immunized the police officer who obtained the war-

rant without probable cause, neither recognizing the existence of contrary First Circuit precedent or substantially responding to it. In addition, the court found that the new standard of good faith immunity set out in *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), did not undercut the holdings of *Madison v. Manter,* 441 F.2d 537 (1st Cir. 1971), and *Stadium Films, Inc. v. Baillargeon,* 542 F.2d 577 (1st Cir. 1976), because the immunity provided by these cases rested upon public policy considerations not addressed by the *Harlow* decision. The district court also went on to hold that it found the "chain of causation" approach of the Fifth Circuit persuasive even if the immunity approach failed.

[1] Although we agree with the district court that the analysis provided by *B.R.C. Transport* was inadequate to support the break with our prior precedent which it in fact makes, we find that the case nonetheless applied the correct legal principle. We now provide the analysis of our prior precedent necessary to support our holding that the issuance of a warrant by a judicial officer does not provide "an impregnable shield" against liability under § 1983 for negligent conduct.

We begin by considering our own precedent in light of recent developments in the defense of "good faith" immunity for police officers. In *Madison v. Manter,* 441 F.2d 537 (1st Cir. 1971), this court held that negligent procurement of a search warrant would not support liability under § 1983. We relied upon *Pierson v. Ray,* 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), the then controlling case on good faith immunity for police officers under § 1983, which held that the common law defenses to false arrest were available to police officers in § 1983 actions.

Madison involved the procurement of a search warrant by local Massachusetts police officers upon the observation of an ordinary smoker's pipe on the floor of a car. The warrant was later found to be without probable cause. Under Massachusetts law, the officers could not be found liable for improper prosecution without a showing of malice. The court found that this immunity from negligence was supported by important policy considerations:

> A police officer has a much larger public to protect than the individual who, in good faith, he suspects of a crime. He, too, may be discouraged from seeking warrants if the cost is a suit for negligence. The inindividual who is the object of a warrant has a mere singleminded protector—the official whose duty it is to screen the application before issuing the warrant.

Madison, 441 F.2d at 539. *Stadium Films, Inc. v. Baillargeon,* 542 F.2d 577 (1st Cir. 1976), for the most part relied upon the reasoning of *Madison.* The court found that even if local Rhode Island police officers "should have known" that the warrants they sought were constitutionally infirm, Rhode Island common law immunized them from liability for such negligence, and under *Pierson* this immunity would extend to § 1983 actions as well.

[2] We first note that, since *Pierson,* the Supreme Court has moved away from a reliance upon state law and toward a federal standard of immunity under § 1983. *E.g., Wood v. Strickland,* 420 U.S. 308, 322, 95 S.Ct. 992, 1000, 43 L.Ed.2d 214 (1975); *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Under the *Harlow* test, the presence of subjective good faith or the absence of malice is irrelevant to the determination of immunity. The conduct of state and government officials is to be measured by an "objective reasonableness"

standard; conduct which violates "clearly established statutory or constitutional rights of which a reasonable person would have known" will support § 1983 liability. *Harlow,* 457 U.S. at 818, 102 S.Ct. at 2738. While the Court has not expressly applied this standard to the § 1983 liability of police officers, its adoption of the *Harlow* standard to determine the good faith of police officers for suppression purposes in *United States v. Leon,* — U.S. —, — & n. 23, 104 S.Ct. 3405, 3421 & n. 23, 82 L.Ed.2d 677 (1984), suggests that it is also applicable to police officers for § 1983 purposes.[2] This objective reasonableness standard replaces the subjective bad faith/malice standards of immunity previously incorporated into § 1983 from state tort law under *Pierson.*

[3] Under the new *Harlow* standard, official conduct which negligently leads to the violation of constitutional rights is sufficient to overcome any qualified immunity that official may have. The objective reasonableness standard should be understood to prohibit conduct which is "constitutionally negligent." This reading of *Harlow* is supported by the Supreme Court's holding in *Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), that negligent deprivations of constitutional

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2. This reading is supported by Justice Stevens' dissent: "As the majority recognizes, *United States v. Leon, ante,* [104 S.Ct.] at 3421-3422 and n. 23, in all cases in which its "good faith" exception to the exclusionary rule would operate, there will also be immunity from civil damages." *United States v. Leon,* — U.S. —, — n. 35, 104 S.Ct. 3405, 3456 n. 35, 82 L.Ed.2d 677 (1984) (Stevens, J., dissenting).

rights are actionable under § 1983. *Id.* at 534, 101 S.Ct. at 1912.[3]

As the district court recognized, the negligence standard set forth by *Harlow* precludes the reliance on state tort law defenses found in *Madison* and *Stadium Films*. The district court, however, found that the concept of official immunity rests upon two independent foundations. Immunity serves, in part, to delimit the degree of culpability required before the "shield of immunity" will be lifted from a public official. This the district court described as the "good faith" aspect of immunity. Immunity also rests upon considerations of public policy: in this kind of case, the potential 'chill' upon law enforcement activities which the possibility of personal liability might create. While *Harlow* did address the issue of culpability by eliminating the subjective, "bad faith" prong of the immunity analysis, the district court found that it had not addressed the policy concerns implicated in such immunity. Therefore, since the rejection of negligence as a basis for police officer liability in both *Madison* and *Stadium Films* also rested upon these policy considerations, the district court considered them to still be valid precedent.

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3. While the holding in *Parratt* is not stated as a holding on the contours of official immunity under § 1983, it cannot be understood to be anything else. The lack of causality which had proven fatal to other attempts to bring negligence under § 1983, see *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), was not an issue because the Court simply assumed the requisite causal connection was present. This left only the issue of culpability, which is one facet of the immunity doctrine.

While we disagree with the district court's view that the *Harlow* standard fails to address policy considerations, we do recognize that this standard was initially developed for application to high executive officials, not police officers. Clearly, there are different public interests at stake where the arena is crime and public safety and the issue is police officer liability for seeking search or arrest warrants. While we conclude that these interests do not necessitate a higher degree of immunity for police officers, we do find it appropriate to address the district court's reasoning in some detail.

[4] We begin with the contention that subjecting police officers to the possibility of personal liability for seeking search or arrest warrants without probable cause will chill them in the performance of their duties. Certainly if the standard of negligence were such that any time a subsequent determination of no probable cause was made a police officer would be considered "constitutionally negligent," then a valid claim of 'chill' could be made. This, however, is not what we understand the standard to be. It is to be noted first that police officers are routinely called upon to make a judgment of whether there is or is not probable cause. Consequently, it is a standard whose basic contours a police officer can reasonably be expected to know. We recognize, however, that police officers cannot be held to the standards of lawyers or judges. It cannot be considered negligence, therefore, for a police officer to seek an arrest or search warrant in a merely questionable situation. In such a case, the determination by the magistrate that a warrant should issue will insulate the officer from a negligence claim. There is a clear difference, however, between a situation in which

there might be probable cause and a situation in which there is *no* probable cause. Under this standard of negligence, we find an emphasis upon the chilling effects of such liability on zealous crime fighting to be inappropriate. This argument overlooks the fact that under our system of government the police have a duty to fight crime without violating constitutional rights. This is difficult at times, but it is what the constitution requires. If we cannot demand of our police officers that they recognize when they do not have the authority to make a search or effect an arrest, then we have given up the very idea of a rule of law. The exercise of police power *within* the law is the very foundation of the social contract.[4] We should expect police officers to have a basic understanding of the limits of their power and we must hold them liable when, negligently or intentionally, they overstep these bounds.

A second argument is made in *Madison* that where a warrant is sought, it is not the police officer who has the burden of protecting fourth amendment rights, but rather the independent magistrate since, unlike the police officer, the magistrate has no conflict in interest between a duty to fight crime and a duty to preserve constitutional rights. The danger in making the magistrate the sole protector of the fourth amendment, however, is twofold. It

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4. [M]ankind will be in a far worse condition than in the state of Nature if they shall have armed one or a few men with the joint power of a multitude, to force them to obey at pleasure the exorbitant and unlimited decrees of their sudden thoughts, or unrestrained, and till that moment, unknown wills, without having any measures set down which may guide and justify their actions.

John Locke, Two Treatises of Government 187 (Dutton, Everyman's Library: New York).

encourages sloppy police work and it enlarges the margin of error leading to unconstitutional invasions of our persons and homes. Unfortunately, not all magistrates subject the affidavit to the scrutiny required by the fourth amendment. The instant case is a perfect example of this. Moreover, the aura of urgency that often surrounds the warrant application process sometimes leads a magistrate to overlook the obvious. At times, the seriousness of the crime being investigated distorts the focus of the magistrate from the facts recited in the warrant application. Under such circumstances, the magistrate is a conduit, not an insulator. The exercise of reasonable judgment by police officers can prevent such errors from occurring without unduly interfering with their crime fighting duties.

We also find that there are significant policy arguments in favor of allowing such liability. The spectre of personal liability may well serve as a deterrent both for individual police officers and their governing units. In addition, we find the remedial purposes of § 1983 well served by the inclusion of negligently caused errors. The fact that such constitutional errors will, for the most part, be rectified somewhere along the line does not in itself provide a remedy for the damage which the error may cause, rather it merely prevents the error from becoming even more serious. The fact that the grand jury failed to return an indictment of the Briggs does not undo the arrest nor repair the damaged psyches and reputations of these plaintiffs. The absolute judicial immunity of the magistrate precludes suit against him or her. Were we to permit the interposition of the magistrate between the police officer and the warrant to immunize the negligence of the police officer, such plaintiffs would be remediless.

We find our reasoning here supported by a parallel fourth amendment analysis of the Supreme Court in *United States v. Leon*, — U.S. —, 104 S.Ct. 3405, in which the Court adopted the *Harlow* reasonableness standard to determine when police conduct required suppression of evidence. The Court indicated that where a warrant is obtained upon the basis of an affidavit which the obtaining officer had no reasonable ground to believe alleged probable cause, the resulting search will not be cured by either the magistrate's approval or the ignorance of the executing officers and the evidence will be suppressed. *Leon*, — U.S. at ——— & n. 23-24, 104 S.Ct. at 3421-23 & n. 23-24. The Court's adoption of the *Harlow* standard for suppression appears to mean that "in all cases in which its 'good faith' exception to the exclusionary rule would operate, there will also be immunity from civil damages." *Id.* 104 S.Ct. at 3456 n. 35 (Stevens, J., dissenting). Thus, since suppression will be appropriate where the obtaining officer should have known there was no probable cause, liability of the obtaining officer will also be appropriate.

We believe the foregoing disposes of the Fifth Circuit's "chain of causation" approach as well. *Rodriquez v. Ritchey*, 556 F.2d 1185, 1193 (5th Cir. 1977), *cert. denied*, 434 U.S. 1047, 98 S.Ct. 894, 54 L.Ed.2d 799 (1978); *Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir.) *cert. denied*, 459 U.S. 1005, 103 S.Ct. 361, 74 L.Ed.2d 397 (1982). Despite the fact that this approach is couched in terms of a principle of causality, we find that at bottom it rests upon the same concerns with culpability and immunity already discussed above. The "chain of causation" theory does not withstand scrutiny. If we use the tort concept of "but

for" cause to determine when a causal connection is present, it seems clear that "but for" the police officer's submission of the warrant to the magistrate, the warrant would not issue and the search or arrest would not occur. It is the decision of the police officer to bring the matter to the magistrate that is the active cause of the search or arrest. Where that decision is the result of negligence, *i.e.,* failure to exercise a modicum of judgment about the presence of probable cause, that negligence is the cause of the improper search or arrest.

[5, 6] We conclude, therefore, that our previous cases, *Madison v. Manter,* 441 F.2d 537 (1st Cir. 1971), and *Stadium Films, Inc. v. Baillargeon,* 542 F.2d 577 (1st Cir. 1976), are no longer controlling. We now rule that judicial approval of a warrant cannot serve as an absolute bar to the § 1983 liability of the officer who obtained the warrant. We emphasize, however, that liability does not attach simply because there is a later determination of no probable cause. Applying the standard of official immunity enunciated in *Harlow,* we hold that *only* where an officer is "constitutionally negligent," that is, where the officer should have known that the facts recited in the affidavit did not constitute probable cause, will liability attach. Where the sufficiency of the facts fall into the grey area appropriate for judicial determination, submission of the affidavit to a magistrate will insulate the officer from liability. We find, therefore, that the district court improperly directed a verdict for Corporal Malley.

Reversed and remanded for a new trial.

ALDRICH, Senior Circuit Judge (concurring).

I do not share the court's view that *United States v. Leon,* — U.S. —, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), merely assists us, rather than disposes of the present question out of hand. *Leon,* in effect, based the exclusionary rule upon a principle of penalizing the officer for his "official misconduct" (*cf.* "bad faith," *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). By this is meant an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Brown v. Illinois,* 422 U.S. 590, at 610-611, 95 S.Ct. 2254, at 2265, 45 L.Ed.2d 416 (1975) (Powell, Jr., concurring in part) quoted in *Leon,* — U.S. at —, 104 S.Ct. at 3423. The Court held that such conduct is not cured by the magistrate's acceptance of the affidavit,* even as against a defendant guilty of unlawful possession. I see no room for argument that the magistrate's action would relieve the officer who cannot be said to have acted in objective good faith vis-a-vis an innocent arrestee. Footnote 35 of Justice Stevens' dissent in *Leon* indicating equivalency, quoted in the court's opinion herein, evoked no response from his brethren, and I can read it only as a noting of inevitable consequences, not as a disputation.

So far as "chill" is concerned, it is already clear that an officer's unreasonable conclusion of probable cause can lead to personal liability. *Cf. Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29

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* "[O]ur good faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal *despite the Magistrate's authorization.*" *Leon,* n. 23. (Emphasis suppl.).

L.Ed.2d 619 (1971). While the reasons for, and loss of, qualified privilege with respect to professional conduct by the high executive officials in *Harlow v. Fitzgerald*, ante, and the lowly police officers in *Leon* are not "perfectly analogous," *Leon*, n. 22, I can have no doubt but that the Court would apply the same general principles of liability and immunity. *Hobson v. Wilson*, 737 F.2d 1, 25 (D.C. Cir. 1984). The magistrate's acting upon the affidavit might be admissible as expert evidence of its reasonableness, *cf. Leon*, n. 23 (last sentence), but it cannot remove impropriety.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Docket No. C.A. 81-0577

Providence, Rhode Island

February 2, 1984

JAMES BRIGGS
LOUISA BRIGGS

Plaintiffs

v.

STATE OF RHODE ISLAND
EDWARD MALLEY

Defendants

TRANSCRIPT OF DECISION

BEFORE THE HONORABLE RAYMOND J. PETTINE,
SENIOR JUDGE, and a jury

TRANSCRIPT ORDERED BY: FAITH LASALLE,
ATTORNEY AT LAW (ATT. GEN.)

APPEARANCES:	Decof & Grimm By: John Foley, Esquire
For the Plaintiffs:	One Smith Street Providence, Rhode Island
For the Defendants:	Department of the Attorney General Faith LaSalle, Attorney at Law 72 Pine Street Providence, Rhode Island
	Department of the Attorney General Charles DiLeva, Esquire 72 Pine Street Providence, R.I.
Court Reporter:	Joseph A. Fontes 201 Federal Building Providence, Rhode Island

(Filed February 15, 1984)

ORDER

(As delivered orally in open court and quoted herein)

FEBRUARY 2, 1984—AFTERNOON SESSION

(Jury is absent)

THE COURT: Well, I'm ready to rule on this motion. I just want the parties to rest assured that I just exhausted every authority that I could lay my hands on, and had endless discussions on the point. This is not a case that can be decided in this court, there's just no question about it. It's an issue of law that has to be decided, ultimately, by the Circuit Court of Appeals. And what they will do of course remains to be seen if the case is appealed. I normally would reserve decision and let the case go to a conclusion and then make a ruling. But, since this has only been a one day trial, I see no value in doing that. There have been no out of state witnesses, no expert testimony, nothing of that kind that in any way just pyramids costs. Here it was a very direct case and it was presented within a day, so I think I would be rather unfair if I didn't rule on this issue as it now stands before me and as I understand the law.

So, this is my ruling. In *Stadium Films, Inc. v. Baillageron,* 542 F. 2d 577, the First Circuit (1976), the First Circuit used broad language to uphold my dismissal of another Section 1983 based on Search and Seizure under an invalid warrant.

> "To the extent that plaintiff's evidence was directed at establishing that the defendants should have known that the warrants were constitutionally inadequate, it was irrelevant. Under the prevailing view in this country, a peace officer may not be held liable in damages for making negligent errors of law in seeking or

executing a search warrant. See, *Madison v. Manta,* 441 F.2d, 537-538, First Circuit, (1971), and cases cited. See also, *Scott v. Dolaheight,* 54 Federal Rules Decisions, 430 at 434, Northern District of Mississippi, (1972). See *F. United States* versus *Barker,* 44 United States Law Week, 2545 D.C. Circuit, (May 17, 1976.)"

A mistake of law in relying on a Magistrate's Approval of a search warrant can be considered virtually, per se, reasonable. Since Rhode Island Law is in accord with the prevailing rule, See *Atkinson* versus *Birmingham,* 44 R.I., 123, 116 Atlantic 205, (1922), defendants are immuned from liability and damages even if they should have known that the warrants were insufficient, *Madison* versus *Manta,* supra at 538. See *Pierson* versus *Ray,* 386 U.S. 547, 87 Supreme Court 1213, 18 Lawyer's Edition 2d, 288 (1967). See *F. Wood* versus *Strickland,* 420 U.S. 308, 95 Supreme Court, 992, 43 Lawyer's Edition 2d, 214 (1975) 542 Fed. 2d at 578.

"Although an argument may be made that this decision rests ultimately on the line of good faith immunity cases recently changed by *Hollow* versus *Fitzgerald,* 102 Supreme Court 2727, (1982)."

An examination of *Stadium Films,* leads me to the conclusion that although it draws some support from the older good faith immunity cases, such as *Pierson v. Ray,* 386 U.S. 547 (1967), it ultimately rests on a line of reasoning similar to that of the Fifth Circuit in *Smith v. Gonsalves,* 670 Fed. 2d 522, Fifth Circuit, (1982). Even if my conclusion about the source of the logic of Stadium Films is in error, I would feel compelled to follow the Fifth Circuit in *Smith v. Gonsalves.* In Smith, the court compared the facts of that case to its earlier case of, *Rodriguez v. Ritchey,* 556 Fed. 2d, 1185, Fifth Circuit, (1977).

In the court's words:

"We stated in Rodriguez that if the facts supporting an arrest are put before an intermediary, such as a Magistrate or Grand Jury, the intermediary's decision to issue a warrant or return an indictment, breaks the causal chain and insulates the initiating party. 556 Fed. 2d 1193. Here, the defendant arranged to have the witness tell her story directly to an Assistant District Attorney who then filed the affidavit resulting in the issuance of the arrest warrant by the Judge. Because the witness personally appeared before the Assistant District Attorney, the defendant police officer's good faith belief in her truthfulness, and thus the existence in his own mind of probable cause became irrelevant. Rather, it first became the Assistant District Attorney's duty, having had his own first-hand encounter with the person complaining, and then the Judge's duty, when he read the affidavit, to make their own inquiry and the determination as to whether an affidavit should be made, or whether there was probable cause to arrest Smith based on the witness' statement. A reasonable division of functions between law enforcement officers, committing magistrates, and judicial officers, all of whom may be entirely consistent with due process of law. *Baker v. McCullen,* 99 Supreme Court at 2695. The independent decisions of these intermediaries broke the causal chain between the defendant and any constitutional violation. 670 Fed. 2d at 526."

As the Fifth Circuit Panel concluded on this point:

"Once a warrant is issued or probable cause comes into existence, it becomes an officer's duty to arrest the suspect, regardless of his personal feelings, good or ill, towards the suspect."

Perry v. Jones, 506 Fed. 2d, 778, 780, Fifth Circuit (1974).

"A Policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty

> if he does not arrest when he has probable cause or a warrant, and being mulcted in damages if he does."

Turner v. Raynes, 611 Fed. 2d, 92 at 93, Fifth Circuit (1980). Citing *Pierson v. Ray,* 386 U.S. 547, 555, 87 Supreme Court 1213, 1218, 18 Lawyer's Edition 2d, 288, (1967), 670 Fed. 2d at 527.

I emphasize certain portions of the language; that would be the part starting with: ". . . A policeman's lot . . ." right down to: ". . . in damages if he does." And that ends the quote.

I, therefore, must grant defendant Malley's motion for a directed verdict on the constitutional claims. Since the Federal Claim is dismissed, I hereby dismiss the pendent State Claim as well.

That's the Order of this Court.

I don't know what to say, Mr. Foley. You certainly have given some very substantial argument. And it may be that the Appellate Court will clear up this point of law. But, I'm obliged to, regardless of any other reason, I'm obliged to apply it as I interpret it.

MR. FOLEY: Thank you, your Honor.

* * *

CERTIFICATION

I hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Joseph A. Fontes
(Court Reporter)

2-15-84
(Date)

APPENDIX C

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 81-0577 P

JAMES R. BRIGGS, et al.

v.

EDWARD MALLEY, et al

OPINION AND ORDER

The plaintiffs in this action have moved the Court to grant them a new trial or, in the alternative, for relief from the judgment entered in this action on February 28, 1984 as to their claims against defendant Malley. The reason for this motion is the First Circuit's recent decision in *B.C.R. Transport Co. v. Fontaine,* 727 F.2d 7 (1st Cir. 1984).

The Court's previous decision, which was rendered from the bench on February 2, 1984, rested on the application of two lines of cases: first, the First Circuit's decisions in *Stadium Films, Inc. v. Baillargeon,* 542 F.2d 577 (1st Cir. 1976), and *Madison v. Manter,* 441 F.2d 537 (1st Cir. 1971), and second, the Fifth Circuit's decisions in *Smith v. Gonzales,* 670 F.2d 522 (5th Cir. 1982), and *Rodriguez v. Ritchey,* 556 F.2d 1185 (5th Cir. 1977). Although the Court noted that it could not be totally certain whether *Madison* and *Stadium Films* rested ultimately on the "good faith" or qualified immunity of *Harlow v. Fitzgerald,* 457 U.S. 800, 818-19, 102 S.Ct. 2727, 2738-39 (1982), or on an-

other notion of immunity, privilege, or public policy which limits the liability which attaches to searches or arrests made pursuant to a warrant obtained in good faith, but negligently, the Court ruled that it would read them as resting upon the latter notion and applied them accordingly. In *Madison,* the court summarized the issue presented and its holding as follows:

> The question, accordingly, is whether negligent conduct, often sufficient to create tort liability, and hence to support section 1983 actions, Whirl v. Kern, 5 Cir., 1969, 407 F.2d 781, cert. denied 396 U.S. 901, 90 S.Ct. 210, 24 L.Ed.2d 177; *cf.* Monroe v. Pape, 1961, 365 U.S. 167, 187, 81 S.Ct. 473, 5 L.Ed. 2d 492, should not have that effect for reasons of policy, in the case of a police officer applying for a warrant.
>
> . . . A police officer has a much larger public to protect than the individual who, in good faith, he suspects of a crime. He, too, may be discouraged from seeking warrants if the cost is a suit for negligence. The individual who is the object of a warrant has a more single-minded protector—the official whose duty it is to screen the application before issuing the warrant. This is the very purpose of the warrant procedure. It must be enough. We decline to place upon policemen acting in good faith the risk of personal liability if that official makes a negligent mistake.
>
> 441 F.2d at 538-39.

In *Stadium Films,* that court held:

> To the extent that plaintiffs' evidence was directed at establishing that defendants "should have known" that the warrants were constitutionally inadequate, it was relevant. Under the prevailing view in this country, a peace officer may not be held liable in damages for making negligent errors of law in seeking or executing a search warrant. *See Madison v. Manter,* 441 F.2d 537, 538 (1st Cir. 1971) and cases cited.

See also Scott v. Dollahite, 54 F.R.D. 430, 434 (N.D. Miss. 1972); *cf. United States v. Barker,* 44 U.S.L.W. 2545 (D.C. Cir. May 17, 1976). ([A] mistake of [law] in relying on a magistrate's approval of a search [warrant] can be considered virtually per se reasonable.). Since Rhode Island law is in accord with the prevailing rule, *see Atkinson v. Birmingham,* 44 R.I. 123, 116 A. 205 (1922), defendants are immune from liability in damages even if they should have known that the warrants were insufficient. *Madison v. Manter, supra* at 538. *See Pierson v. Ray,* 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); *cf. Wood v. Strickland,* 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975).

542 F.2d at 578.

Stadium Films is less clear, but the language quoted from *Madison* implies strongly that the basis of decision was not mere qualified immunity, but rather a different notion which protects a police officer who has conscientiously sought a warrant from a neutral magistrate. Although the previous opinion did not note this, even under *Harlow v. Fitzgerald's* reasoning it may be reasonable for a policeman who believes that the facts in his affidavit are true to defer to a judicial determination that those facts constitute probable cause, thereby allowing him immunity from liability.

Additionally, the February 2 opinion relied on the reasoning of the Fifth Circuit in *Smith, supra,* and *Rodriguez, supra.* In *Smith,* the Fifth Circuit reaffirmed its rule that "if the facts supporting an arrest are put before an intermediary such as a magistrate or grand jury, the intermediary's decision to issue a warrant or return an indictment breaks the causal chain and insulates the initi-

ating party." 670 F.2d at 526 (citing *Rodriguez v. Ritchey*, 556 F.2d 1185, 1193 (5th Cir. 1977)).

After reconsidering the application of *Stadium Films*, *Madison*, *Smith*, and *Rodriguez* to this case, the Court reaffirms its previous ruling. Although it is true that consideration of the logic of any of these cases would have mandated a different result in the First Circuit's recent decision in *B.C.R. Transport*, *supra*, it does not appear that these arguments were raised in that case. In *B.C.R. Transport*, the two holdings which are relevant here were: 1) probable cause does not exist per se because the information comes from a person claiming to be a crime victim; and 2) the qualified immunity of *Harlow v. Fitzgerald*, *supra*, is not automatically obtained upon a showing that an officer acted upon information from an alleged victim. 727 F.2d at 10. These two points are beyond dispute—however, neither addresses the arguments made by the defendant in the instant case. The plaintiffs point out that in footnote one of *B.C.R. Transport* the court wrote:

> In this connection we find it disingenuous on Fontaine's part to suggest that since the magistrate issued the warrants, this judicial imprimatur is an impregnable shield against any attack on the sufficiency of the underlying affidavit. This is unquestionable bootstrapping. *See Aguilar v. Texas*, 378 U.S. 108, 111, 84 S.Ct. 1509, 1512, 12 L.Ed.2d 723 (1964) ("Although the reviewing court will pay substantial deference to judicial determinations of probable cause, the court must still insist that the magistrate . . . not serve merely as a rubber stamp for the police").
>
> 727 F.2d at 10 n.1.

Aguilar, however, was a criminal case discussing probable cause, not a §1983 case on liability. The fact that

a warrant is issued never insulates a lack of probable cause, and the criminal defendant is always free to challenge the legality of a warrant. The point in the instant case, however, is that even though a neutral magistrate's approval of a warrant application does not create probable cause where there is none, it may absolve the applicant policeman from liability because of either public policy or because the magistrate's action breaks the chain of causation.

Therefore, since *B.C.R. Transport* addresses neither the Court's interpretation of *Madison* and *Stadium Films* nor the break in the chain of causation theory of *Smith* and *Rodriguez,* and since, after reconsideration, the Court still finds the reasoning of these cases persuasive, the plaintiffs' motion for a new trial or, in the alternative, for relief from the judgment entered on February 28, 1984, is hereby DENIED.

So ordered.

By Order,

/s/ Concetta R. Zinni
Deputy Clerk

Enter:

/s/ Raymond J. Pettine
Senior Judge

May 14, 1984

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1449

JAMES R. BRIGGS AND LOUISA BRIGGS,

Plaintiffs, Appellants,

v.

EDWARD MALLEY, ET AL.,

Defendants, Appellees.

JUDGMENT

November 19, 1984

This cause came on to be heard on appeal from the United States District Court for the District of RHODE ISLAND, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: That part of the District Court judgment only as to Edward Malley is vacated and the cause is remanded to the District Court for a new trial consistent with the opinion filed this day.

By the Court:
Francis P. Scigliano

Clerk.

[cc: Mr. Foley & Ms. LaSalle]